

MONTANA PUBLIC DEFENDER COMMISSION

State Capitol, Room 102
and Great Northern Hotel
Helena, MT

December 11-12, 2015

MINUTES

Approved at the February 26, 2016 Meeting

FRIDAY, DECEMBER 11

Commissioners Present

Richard E. "Fritz" Gillespie, (Chair), Helena; Margaret Novak, Chester; Ann Sherwood, Pablo; Bonnie Olson, Marion; Mike Metzger, Billings; Maylinn Smith, Missoula; Larry Mansch, Missoula. Brian Gallik, Bozeman, attended by phone.

Commissioners Absent

Terry Jessee, Billings; Roy Brown, Billings

Staff Members Present

Bill Hooks, Chief Public Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director; Wendy Johnson, Contract Manager; Peter Ohman, Training Coordinator; Eileen Larkin, Assistant Appellate Defender; Koan Mercer, Assistant Appellate Defender; Carleen Green, Accountant; Dave Stenerson, Regional Deputy Public Defender, Missoula

Interested Parties

Representative Kenneth Holmlund, Miles City; Caitlin Borgmann, Executive Director, American Civil Liberties Union of Montana (ACLU); Greg DeWitt, Legislative Fiscal Division; Malissa Williams, Office of Budget and Program Planning; Amy Sassano, Deputy Budget Director

1. Call to Order

Chairman Fritz Gillespie called the meeting of the Public Defender Commission to order at 9:05 a.m.

2. Introductions

Chairman Gillespie welcomed Representative Holmlund, a member of the Task Force on Public Defender Operations. Representative Holmlund is dedicated to helping the agency improve.

3. Approve Minutes of October 2, 2015 Meeting (*Action Item)

Commissioner Olson moved to approve the minutes of the October 2, 2015 meeting as drafted. Commissioner Smith seconded and the motion carried.

4. Holistic Defense Presentation (Commissioner Sherwood)

Commissioner Sherwood presented the concept of the holistic defense model and showed a film about the Bronx Defenders' implementation of holistic defense. The four pillars of holistic defense are seamless access to services; dynamic, interdisciplinary communication; advocates with an interdisciplinary skill set; and a robust understanding of, and connection to, the community served.

The Tribal Defenders have implemented the holistic defense model with technical assistance from the Bronx Defenders. Surprisingly, they were able to do it without additional resources. Commissioner Sherwood introduced the members of her team in attendance: Susette Billedeaux, director of the reentry program, cultural mentoring services, and driver's license restoration; Danny Tenenbaum, who interned with the Bronx Defenders, and Justin Kalmbach, Tribal Defender civil attorney. Other team members include psychology interns, a civil advocate, a case manager, and criminal attorneys. They offer mediation services through the University of Montana, and cultural mentoring provided by community volunteers.

The Tribal Defenders act as the community resource for all legal questions and provide seamless access to all types of services. They are especially concerned with collateral consequences, such as losing housing. These problems aren't only the result of convictions; just facing charges can create problems for clients. They have created several diversion programs, including mental health and bad check programs.

Commissioner Sherwood said that while holistic defense reduces recidivism that is not the only measure of success. Clients have basic needs that, if met, will make them more successful. Her suggestions for OPD are to look at communities for the needs and the resources available to address them; be present in the community; collaborate; and educate the community on issues. She proposed that OPD conduct a pilot project in the Missoula office due to the number of resources available there.

5. Report on State Special Revenue (Commissioner Olson)

Commissioner Olson recapped the issues related to collecting public defender fees for deposit into OPD's State Special Revenue (SSR) account. She has been working on solutions, but so far there are no good ones. Discussions with the Supreme Court Administrator put the possibility of accessing information from the Full Court case management system at least two years out. Obtaining detailed information from each of the 208 individual courts is not a manageable solution due to OPD resource limitations.

The Commission explored ideas to suggest to the Task Force on Public Defender Operations to resolve the problem with fee collections. Alternatives to public defender fees could be community service, an application fee (subject to ability to pay), or resolution of the conflict between Title 46 and Title 17. Representative Holmlund said that educating the legislature regarding this topic is key. Many legislators, like him, are interested in dollars, not just policy, and he estimates that only about 20% of legislators understand the issues regarding OPD fee collections.

6. Report on 12/10 Task Force Meeting (Chairman Gillespie)

Chairman Gillespie reported that the Task Force asked OPD to work on several things for their next meeting February 1. He asked Administrative Director Harry Freebourn to reissue the requests for proposals to contract for both eligibility determination and fee collections.

Most Commission members view the Task Force activities as an opportunity to inform legislators about issues important to OPD. Commissioners Smith, Olson, Sherwood and Novak attended yesterday's meeting, in addition to Chairman Gillespie and staff members. Commission members agreed that the Task Force wants to improve the system and make it more efficient. The agency has been invited to have input on best practices the Task Force hopes to develop, such as a solution to the disproportionate number of Native Americans in our jails. However, we need to find a way to correct inaccurate information that might be presented to the Task Force.

Chairman Gillespie thanked Representative Holmlund for attending today's meeting, and invited staff to comment on the Task Force meeting. Staff also welcome the opportunity to work with the Task Force to improve the agency, and the chance to provide in-depth education regarding OPD operations.

Mr. Freebourn was asked by Task Force members to prepare a 10 year plan, identifying where in the 10 years agency funding stabilizes. Mr. Freebourn said that all the volatility is in the civil program. He suggests creating two new programs, one for the civil unit, and one for the Executive Director/Central Services function. This will show that Programs 1-3 are very stable, and only the civil program is unpredictable.

7. Report on NAPD Site Visit (Chief Public Defender Bill Hooks)

Fred Friedman, from the National Association for Public Defense (NAPD) Systems Builders Committee, recently visited Eastern Montana at the invitation of Chief Hooks. Mr. Friedman met with Chief Hooks and the regional deputies from Lewistown, Glendive and Miles City, where he got a good idea of the issues involved in managing contract attorneys and other challenges in those rural areas. Representative Holmlund was invited as well, and spent several hours with Mr. Friedman and OPD staff; this is the kind of in-depth dialogue that is needed to really share knowledge of the issues facing OPD.

Mr. Friedman spent the following day in Billings, where he discussed the conflict program with Conflict Coordinator Kristina Neal and visited with the Billings regional deputy. He also attended law and motion in Judge Gustafson's court, discussed her treatment and DN courts with her, and met with three contract attorneys, including Matt Wald, current Montana Association of Criminal Defense Lawyers (MTACDL) president. Commissioner Jessee provided a tour of the detention facility. The day provided a lot of insight from various perspectives.

Mr. Friedman and other NAPD volunteers and resources are available to the Commission; they are willing to work remotely or to make additional site visits. They can discuss organizational issues, including resources to help with restructuring the agency. Chief Hooks is excited to continue the relationship and invited the Commission's direction.

Chairman Gillespie asked for Mr. Friedman's observations and written comments soon. Commissioner Sherwood supports working with NAPD, especially on restructuring and incorporating an executive director position.

Commissioner Novak made a motion that Chief Hooks communicate with NAPD and ask them to make formal recommendations to the Commission, and that the Commission communicate this information to the Task Force. Commissioner Sherwood seconded and the motion carried. Commissioner Sherwood added that she also supports the informal association and advice NAPD and Mr. Friedman are providing.

8. Treatment Court Update (Chief Hooks)

Chief Hooks reported that there are new developments in treatment courts. A legislative audit identified problems in district court drug courts that will impact OPD. In addition, federal funding for treatment courts is waning, and there will be pressures for state general fund appropriations to fill the gap.

The benefits of treatment courts to OPD clients are many, but they are a drain on resources. In addition, there are conflicts of interest and ethical issues in staffing these courts in the smaller communities. The individual courts continue to proliferate, but they lack consistency, other than judges expect OPD to staff them. Many treatment courts were initially set up as diversionary courts, but they increasingly operate as postconviction courts—a condition of sentencing more demanding than straight probation.

Commissioners Sherwood and Smith are of the opinion that you shouldn't have to plead guilty to get the services provided by treatment courts. They support OPD's involvement only in diversionary courts, which also addresses some of the ethical considerations involved.

Chief Hooks will keep the Commission apprised of further developments, in particular as decisions need to be made.

9. FY 2015 Governor's Report (*Action Item)

Commissioner Olson moved to adopt the FY 2015 Report to the Governor, Supreme Court and Legislature as drafted. Commissioner Gallik seconded and the motion carried.

10. Strategic Planning Committee

A. Draft Strategic Plan (*Action Item)

Committee Chair Olson reported on the Committee's activities. The draft strategic plan presented today still needs date compliance and measureable objectives, but the Committee thinks it is a good start. Commissioner Olson views it as a work in progress, and asked the Commission for feedback.

Commission members suggested changes to the plan, including reviewing the entire case weighting system, rather than just in relation to Program 2; expressly including tribal colleges in Goal IV; and ensuring that the goals and objectives are aligned with the American Bar Association *Ten Principles of a Public Defense Delivery System*. The addition of a civil program was also discussed.

The consensus was that the strategic plan is still a work in progress. Chairman Gillespie asked the Commission to work as a committee of the whole for further revisions. The draft plan will be circulated for comments and/or additions. Commissioner Olson reminded everyone that the plan needs to be brief, measurable and understandable since OPD's constituency includes non-attorneys.

Jim Taylor, ACLU Legal Director, submitted written public comment including thoughts on the draft plan for the Commission's consideration (see Attachment A).

11. Budget Committee

A. Uses for Commission's Discretionary Funds (*Action Item)

Chairman Gillespie chairs the Budget Committee, which met on November 16 and 23 to consider suggestions for the use of the Commission's discretionary funds. The Committee has three recommendations for the Commission's deliberation, although there is some debate about whether all of the recommendations meet the legislative intent of the appropriation. Chairman Gillespie noted that the \$500,000 appropriation for the 2017 biennium doesn't all have to be committed now.

Mr. Freebourn provided cost estimates for the three recommendations:

Item 1: Agency workload study (National Center for State Courts), \$208,000

Item 3: Enhancements to the online billing system (CRM), \$100,000

Item 6: Additional attorney FTE for the Appellate office, \$100,000 per year each (there is currently a .5 unfunded FTE in that office)

Chairman Gillespie suggested that it would be easier to justify supporting the per diem costs of an NAPD consultation than the proposed National Center for State Courts (NCSC) workload study. The purpose of the appropriation is to relieve pressure on the system, not to do a study on how to improve the system. He asked Deputy Budget Director Amy Sassano to comment. Ms. Sassano said that Budget Director Dan Villa will make the final decision on the plan for using the discretionary funds, based on the language in the executive budget. Chairman Gillespie and Commissioner Olson suggested that funding for the NCSC study could be part of the budget submission for the next biennium.

Mr. Freebourn provided a cost breakdown for Item 3, enhancements to the online billing system. The first enhancement is estimated at \$15,000; it will offer a cost analysis function, providing real time information on expenses to date on a specific case. It will also help determine what each case type costs and gives a place to start in setting soft caps. The second enhancement will be approximately \$50,000. This will allow the addition of all other vendors (investigators, experts, mental health providers) to the

claim system, which currently is available only to attorneys. An additional \$35,000 will allow the agency to hire or contract for the data analysis. Soft caps would be developed following the data analysis.

Commissioner Sherwood moved to allocate up to \$100,000 for the CRM enhancements. Commissioner Olson seconded and the motion carried.

Commissioner Sherwood moved to approve the expenses associated with the NAPD consultation instead of an agency workload study by NCSC. Commissioner Smith seconded and the motion carried.

Greg DeWitt, Legislative Fiscal Division, suggested attaching a dollar amount to this item. Commissioner Novak moved to reconsider the motion. Commissioner Sherwood seconded and the motion to reconsider carried. Commissioner Sherwood made a new motion to cover the expenses of the NAPD consultant up to a maximum of \$10,000 for the biennium. Commissioner Mansch seconded and the motion carried.

Commissioner Novak moved to add 1.5 FTE attorneys to the appellate office, in addition to the current number, including the unfunded .5 FTE now on board. Commissioner Mansch seconded and discussion followed. Assistant Appellate Defender Koan Mercer was asked to compare the number of FTE in the appellate office to the number in the attorney general's office; they are roughly comparable. These will be modified (temporary) positions. The additional FTE will reduce the backlog, but they may not work through it by the end of the biennium because case numbers are up 10% to date for FY 16. So far, Mr. Mercer has contracted out as many cases as he could get contractors to take, and they are still a year behind. There is no way to know what that will cost, but Mr. Mercer believes that the contract costs will even out by the end of the biennium.

Following discussion, the motion carried with one opposed.

Further discussion revealed some confusion regarding the number of positions to be funded with the discretionary funds. Commissioner Novak moved to reconsider the motion. Commissioner Olson seconded and the motion to reconsider carried.

Commissioner Olson moved to fund the existing .5 FTE position through this biennium using the Commission's discretionary funds. Commissioner Sherwood seconded and the motion carried.

Commissioner Novak moved to fund 1.5 FTE additional appellate positions for the biennium from the discretionary fund. Commissioner Mansch seconded. The motion carried with one opposed.

Mr. Freebourn did an accounting of the discretionary funds for the biennium, totaling \$410,000:

- \$10,000 for the NAPD consultation;

- \$100,000 for CRM enhancements;

- \$300,000 for a total of 2 appellate FTE attorneys for the remaining one and a half years of the biennium.

Commissioner Smith was uncomfortable with that accounting, saying that the 2 FTE took a huge portion of the available funds. She moved to reconsider the motion, and Commissioner Olson seconded. The motion to reconsider carried.

Commissioner Smith moved to add 1 additional appellate FTE, in addition to the .5 existing FTE. Commissioner Olson seconded. This will reduce the price tag by \$75,000 (.5 FTE x \$100,000 per year x 1.5 years). The total committed would then be \$335,000 for the biennium, leaving \$165,000 to be allocated in the future. The motion carried unanimously.

12. Public Comment

Jim Taylor, ACLU Montana Legal Director, submitted written comments (see Attachment A).

13. Old Business/New Business (*Action Items)

- A. *Approve Governor's Report (*Action Item)*
Action was taken on this under Item 9.
- B. *Approve Strategic Plan (*Action Item)*
This item will be presented again after further revisions.
- C. *Approve Uses for Discretionary Funds (*Action Item)*
Action was taken on this under Item 11.

14. Personnel Committee

- A. *Overview of Hiring Process*
Lisa Coligan, State Human Resource Officer, has been working with the Personnel Committee on the recruitment and selection of a new chief appellate defender. The hiring process included screening applicants for minimum qualifications and conducting preliminary telephone interviews with three applicants. Chad Wright was the single applicant selected for a final interview by the full Commission. Public comment will be taken following the interview, and then the meeting will be closed for deliberations.
- B. *Chief Appellate Defender Interview—Chad Wright*
Ms. Coligan documented the interview as part of the recruitment and selection process.

15. Public Comment

Ms. Neal said that she fully supports Mr. Wright. He is an incredible mentor and leader.

Chief Hooks commended Mr. Wright without reservation; he is an excellent attorney. He will be a great team member and staunch advocate for his staff and their clients.

Assistant Appellate Defender Eileen Larkin said that any concerns the Commission might have about staff working well with a new leader can be laid to rest. The appellate staff works as a team and will coalesce behind a new leader.

16. Executive Session (Closed)

Chairman Gillespie closed the meeting at 4:30 p.m., stating "The following portion of the meeting relates to matters of individual privacy. As Commission Chairman, I have determined that the demands of individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed."

17. Announce Decision Regarding Chief Appellate Defender

The meeting was opened to the public at 5:00 p.m. The Commission offered Mr. Wright the position, and he accepted. He will be available to start full time following the completion of a homicide trial in February. State Human Resources Division will work out details for part-time employment in the interim.

The meeting recessed at 5:02 p.m., and will reconvene at the Great Northern Hotel at 8:00 a.m. Saturday.

SATURDAY, DECEMBER 12

Chairman Gillespie reconvened the meeting at 8:05 a.m. at the Great Northern Hotel.

Commissioners Present

Fritz Gillespie, (Chair), Helena; Margaret Novak, Chester; Ann Sherwood, Pablo; Bonnie Olson, Marion; Mike Metzger, Billings; Maylinn Smith, Missoula; Larry Mansch, Missoula. Brian Gallik, Bozeman, attended by phone.

Commissioners Absent

Terry Jessee, Billings; Roy Brown, Billings

Staff Members Present

Bill Hooks, Chief Public Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director

Interested Parties

None

Chairman Gillespie announced that the first item of business would be discussing the assignments to the agency due at the February 1 Task Force meeting. He assigned Commissioner Olson, as chair of the Strategic Planning Committee, to manage this process for the committee of the whole.

Staff and Commission members shared their notes from the Task Force meeting, and compiled a list of assignments. They will be due to Legislative Services in late January.

18. Personnel Committee

C. Review Performance Evaluation Process for Chief Public Defender, Chief Appellate Defender (Vacant), Conflict Coordinator, Administrative Director

The evaluation process consisted of three parts—confidential written evaluations by Commission members and subordinates and/or peers (as appropriate for each person being evaluated); a self-evaluation; and individual interviews with each manager. The initial interviews were conducted at the November 16, 2015 Personnel Committee meeting. The evaluation tools are included with the materials for that meeting. Final evaluations by the full Commission are today.

19. Public Comment

No members of the public were present.

20. Executive Session (Closed) for Individual Performance Evaluations

Chairman Gillespie closed the meeting at 11 a.m., stating “The following portion of the meeting relates to matters of individual privacy. As Commission Chairman, I have determined that the demands of individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed.”

21. Adjourn

The meeting adjourned at the conclusion of the executive session.